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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

AEROSPACE DYNAMICS INTERNATIONAL, INC., Plaintiff, Appellant, and Cross-Respondent, v. FRIZE CORPORATION, INC., Defendant, Respondent, and Cross-Appellant.	B186725 (Los Angeles County Super. Ct. No. PC 031407)

APPEAL from a judgment of the Superior Court of Los Angeles County, John P. Farrell, Judge. Affirmed.

Agnew & Brusavich, Bruce M. Brusavich and Gerald E. Agnew; Esner, Chang & Ellis, Stuart B. Esner, Andrew N. Chang and Gregory R. Ellis for Plaintiff, Appellant, and Cross-Respondent.

Lewis Brisbois Bisgaard & Smith, Roy G. Weatherup and Caroline E. Chan; The Morrison Law Group and Edward F. Morrison, Jr., for Defendant, Respondent, and Cross-Appellant.

INTRODUCTION

Aerospace Dynamics International, Inc. (ADI) contracted with Frize Corporation (Frize) to paint a building. Frize subcontracted the work to J. C. French. Edwin Limber Mendoza, Jr., an employee of J. C. French, sustained injuries while on the painting job and sued ADI and Frize. ADI settled with Mendoza, Jr. in his personal injury action by waiving the issue of liability and referring the damages question to a retired judge. After a trial, the referee found that Mendoza, Jr. had sustained $2.7 million in damages. ADI assigned its indemnity claim against Frize to Mendoza, Jr. and made a refundable cash payment of $350,000 to him in exchange for a covenant not to execute on any sums above that amount.

ADI brought the instant indemnity action against Frize. The jury found that ADI, Frize, and J. C. French were all negligent and ADI's negligence was "active." The jury found that Frize was obligated to defend and indemnify ADI. It also found, while there was no collusion in the manner in which the Mendoza, Jr. settlement was obtained, that ADI did not have a reasonable belief that it had an interest to protect and the settlement sum was not reasonable. Based on the jury's findings, the trial court ruled that Frize was obligated to indemnify ADI but only for the amount ADI actually paid as the result of its settlement with Mendoza, Jr., plus costs, fees, and interest.

In its appeal, ADI contends that the trial court erred in declining to accord conclusive effect to Mendoza, Jr.'s settlement amount and in limiting ADI's recovery to the amount it actually paid in its settlement with Mendoza, Jr. In its cross-appeal, Frize challenges the trial court's ruling that Frize was required to indemnify ADI at all. For the reasons set forth below, we affirm the judgment in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The parties*

ADI, an aerospace fabricator with a large three-building facility in Valencia, California, employed Frize to paint the walls of one of its buildings. Frize is a construction firm that has worked on many projects for ADI. Frize incorporated J. C. French's bid into the bid it submitted to ADI.

Edwin Limber Mendoza, Sr. was the J. C. French foreman. His 16-year-old son, Mendoza, Jr., worked for J. C. French as a painter's helper during weekends and on vacations from school. He prepared the paint, threw out trash, and removed painter's tape from light fixtures. ADI did not know that a 16-year-old laborer was part of the J. C. French crew working on this job; had they known, they would have put a stop to the practice.

2. *The contract*

The contract between ADI and Frize was a "purchase order" on a five-part form prepared and printed by ADI. The white copy for the "Vendor" and the pink copy entitled "Acknowledgment" were for Frize, the "Seller." The back of each page of the five-part purchase order included the following provision in paragraph 26: "The Seller including contractors and all subcontractors (if any) *shall protect the Buyer* [*ADI*] *against any and all liabilities*, claims or demands *arising directly or indirectly from or in connection with work performed* . . . hereunder and *shall indemnify the Buyer and hold it harmless from* all loss and damage *and shall defend Buyer against any and all claims* (including but not limited to, injuries to persons or damage to property) arising from the failure of the Seller (including contractors and all subcontractors, if any) the Buyer or the agents, servants or employees or any of them to *conform to the statutes*, ordinances, regulations or *requirements of any governmental authority*, concerning or in any way relating to (either directly or indirectly) any work done, materials delivered hereunder or the operations and techniques employed in connection therewith and *arising from anything done by the negligence of* the Seller (including contractors and all

subcontractors, if any) *the Buyer or the officers, agents, servants and employees of any of them while engaged in the performance of any act directly or indirectly related to work done or materials delivered or while in and about the premises of the Buyer . . . .*" (Italics added.)

3. *The overhead crane's buss bar and the walk-through*

Building One has an overhead bridge crane, a kind of movable beam that spans the entire width of the building. One end of the bridge crane sits atop an I-beam, which beam lies flush against the back wall, 18 feet above the ground. The bridge crane is electrically powered by a buss bar or runway rail conductor, which is a strip shaped like an upside-down "U," that runs along the length of the I-beam's top edge. The electrical current inside the buss bar is 460 to 480 volts. It is dangerous because it is very sensitive and the live electricity is invisible.

ADI employees testified that they, together with representatives of Frize and J. C. French, walked through Building One three times to ascertain the scope of work and to discuss safety issues. The second walk-through was "principally about making sure that anybody working in the area knew not to go near where the buss bar was even though we were going to have it turned off." During the third walk-through, the main issue was the overhead crane. The walk-through participants specifically discussed the overhead crane "one more time." An employee of ADI remembered that Mendoza, Sr. made a comment that he had worked around the crane frequently. Another ADI employee wanted to express his concerns about some safety issues about which J. C. French, who was new to the job, was unaware. Frize's job foreman, Patrick McCarthy, made it "very clear to everybody there that, do not get near that bus[s] bar period. It was very clear, restated two or three times, do not get near it." They also discussed not touching the buss bar even with the power off because it is sensitive.[1]

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[1] Mendoza, Sr. testified that he did not participate in any walk-through or have any discussion about the dangers of the electrical buss bar for the crane

Mendoza, Sr. mentioned to his workers that the overhead crane in Building One posed an electric hazard. Because it was a school day, Mendoza Jr. was not present for that conversation.

The plan was to de-energize or turn off the overhead bridge crane's buss bar when the painters reached the south side of the building. California and federal Occupational Safety and Health Administration (OSHA) have issued guidelines for de-energizing electrical devices that include securing the circuit breaker switch controlling the flow of power to the device and then placing on the electrical panel a tag identifying who locked the device. The procedure is designed to prevent accidental re-energizing and to identify the person who can turn the electricity back on. Commonly referred to as a "lock out and tag out procedure," de-energizing electrical equipment is normally the responsibility of the owner so that employees will not be injured. Hence, ADI has written safety procedures. The parties agreed that Mendoza, Sr. would give ADI advance warning when he wanted the buss bar's power turned off. Once he warned ADI personnel, they would shut the power off.

As work was underway and the painters finished the east side of the building, ADI's safety and environmental supervisor Ronald Rutherford noticed the painters were moving toward the rear of the building. Rutherford told Chuck Kuni, the maintenance manager, to turn off the circuit breaker for the bridge crane. Rutherford watched Kuni turn the circuit breaker off and place a locking device on the circuit breaker. Rutherford watched Kuni test the lock and then tested it himself and was satisfied that it was safely turned off.

4. *Mendoza, Jr.'s injury*

J. C. French commenced painting in late April 2001. By Saturday, April 28, 2001, the painters had finished the back of the building and it was time

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before the painters began their work. But he did express his concerns about it to McCarthy.

to begin cleaning and taking down the tape and paper. Mendoza, Jr. was part of the clean-up crew.

As directed by his father, Mendoza, Jr. walked around the building to make sure all of the painter's paper and plastic had been taken down. He saw that a light fixture high up on the wall over the I-beam supporting the buss bar still had a cover. Deciding he would remove the plastic, he got a 10-foot cotterman rolling ladder and rolled it next to the door. Unable to reach the light fixture while standing on the ladder's platform, he climbed on top of the ladder's handrails and onto the bridge crane's runway rail.

Once on top of the runway rail, he reached up and pulled the tape off the light and threw it to the floor. On his way back down, while trying to climb onto the ladder's safety railings, Mendoza, Jr. grabbed the buss bar. He knew there was high voltage on the I-beam, but he was also told that the power had been turned off. Apparently, the buss bar was fully energized and so Mendoza, Jr. sustained severe electrical burns to his dominant hand when he grabbed the buss bar. He has undergone numerous surgeries. The injuries are significant and disabling.

5. *The ensuing lawsuits*

Mendoza, Jr. sought worker's compensation benefits and filed a personal injury action against ADI and Frize. Frize successfully moved for summary judgment.

Pursuant to the purchase order's paragraph 26, the indemnity provision, ADI repeatedly tendered its defense to Frize. Frize declined to defend ADI. Hence, ADI filed the instant action (the indemnity action) against Frize alleging Frize had breached its contractual obligation to indemnify ADI in Mendoza, Jr.'s personal injury lawsuit. Frize opposed the efforts of ADI to consolidate the indemnity action with Mendoza, Jr.'s lawsuit.

Meanwhile, in Mendoza, Jr.'s personal injury action, ADI settled with J. C. French's workers' compensation carrier, Explorer Insurance Company. ADI paid the carrier $62,500.00 in full satisfaction of the $210,326.25 in worker's

compensation benefits Explorer paid Mendoza, Jr. in exchange for an assignment of lien rights for the benefits it actually paid.

6. *The settlement of Mendoza, Jr.'s personal injury action against ADI*

Mendoza, Jr. made numerous settlement offers. Feeling abandoned by Frize and facing a potentially large jury award against it, ADI reached a settlement with Mendoza, Jr. Thereunder, ADI waived a jury and agreed to try the damages issue only by reference to a retired judge. (Code Civ. Proc., § 638.) ADI assigned to Mendoza, Jr. all of its rights under the indemnity agreement in exchange for a covenant to not execute on the referee's damages award. The parties agreed that if damages exceeded $350,000, ADI would advance that sum to Mendoza, Jr. and would be repaid from any recovery he obtained from Frize above $350,000. Mendoza, Jr. agreed, upon collection of any judgment against Frize, to repay ADI any sums the latter advanced, plus attorney's fees and costs incurred to date.

The issue of damages was tried to the referee in May 2003. No one told the referee about the agreement between ADI and Mendoza, Jr. The referee's task was to hold a hearing on the evidence and to determine the nature, extent, and amount of damages Mendoza, Jr. suffered. There was no agreement or discussion between ADI and Mendoza, Jr. about what the amount of damages should be.

The referee determined that Mendoza, Jr. sustained $1.2 million in economic damages and $1.5 million in non-economic damages for a total of $2.7 million. Pursuant to the referee's award, the trial court entered judgment in the amount of $2.7 million plus costs and interest.

7. *The jury verdicts in the indemnity action*

The instant indemnity action was tried to the jury in two phases. At the close of the first phase, the jury returned a special verdict finding that Frize had entered into a contract with ADI that included an obligation to defend and indemnify ADI for injuries or claims which would arise directly or indirectly from or in connection with the work performed under the purchase order at issue. The jury found that the contract's terms were clear and that the parties agreed to the

terms of the contract. It found that Frize, J. C. French, Mendoza, Jr., and ADI were negligent and that each party's negligence was a substantial factor in causing Mendoza, Jr.'s harm. Specifically, the jury found that Frize and J. C. French were each 21 percent, Mendoza, Jr. 10 percent, and ADI 48 percent responsible for the injury. The accident was caused directly or indirectly from matters which were within the scope of Frize's work under the purchase order, and by a condition over which ADI retained control. Finally, the jury found that ADI was actively, as opposed to passively, negligent.

The next day, the trial court ruled that the purchase order's paragraph 26's indemnity provision was a Type I clause that indemnified ADI for its active negligence. Pursuant to *Peter Culley & Associates v. Superior Court* (1992) 10 Cal.App.4th 1484 (*Peter Culley*) the court ordered the case to proceed to the second phase where the jury would determine whether the amount of Mendoza, Jr.'s damages was reasonable and whether the ADI – Mendoza, Jr. settlement was collusive. The court ruled that Frize did not participate in the defense of the underlying action and so the burden would fall on Frize to show that the damages amount was not reasonable.

8. *The jury verdict at the close of the second phase of the indemnity trial into whether the settlement of Mendoza, Jr.'s personal injury lawsuit was collusive and the damages were reasonable.*

In the second phase of the indemnity trial, the trial court told the same jury that it could consider evidence from the first phase. The court explained that the second phase "concern[ed] an assignment agreement" entered into between ADI and Mendoza, Jr. in the personal injury action, "whereby they agreed to waive a jury trial and to have a conference before a retired judge as to damages only." The court further explained that ADI did not contest liability and that the referee had "determined damages in the amount of $2.7 million, which was entered into a judgment against [ADI]." The court recited the provisions of the settlement agreement, including that Mendoza, Jr. would "not collect or enforce judgment

against ADI for more than $350,000 and that ADI would pay Mendoza $350,000, but ADI is behind Mendoza's indemnity rights for the entire judgment against Frize." The court then explained that Frize bore the burden to prove (1) that ADI acted unreasonably in having judgment entered against it, and (2) that the $2.7 million was unreasonable and resulted from collusion between Mendoza, Jr.'s attorney and the attorneys for ADI.

At the close of the trial, the jury was asked: "Given that the $2,700,000.00 judgment against [ADI] is presumed to equal the amount of [ADI's] liability to Edwin Limber Mendoza, Jr., has Frize Corporation overcome that presumption by proving: [¶] a. that the amount of the judgment is unreasonable? [¶] . . . [¶] b. the judgment was taken collusively? [¶] . . . [¶] c. the judgment was taken when [ADI] did not have a reasonable belief that it had an interest to protect? The jury answered yes to a. and c. and no to b.

Synthesizing the verdicts from the two phases of the indemnity trial, the court ordered Frize to indemnify ADI for the sum the latter actually paid out, consisting of (1) the advanced payment of $350,000 ADI made to Mendoza, Jr. in the agreement; (2) the amount paid to Frize's workers' compensation carrier, i.e., $62,500; (3) the reasonable attorney fees and costs ADI paid of $108,500; (4) plus costs and interest allowed by law for a total judgment of $631,122.62. ADI appealed and Frize cross-appealed.

CONTENTIONS

Frize contends, based on the language of paragraph 26 of the purchase order and the jury finding that ADI was actively negligent, that the trial court erred in requiring it to indemnify ADI. Frize also contends, even if ADI is entitled to indemnification, that its recovery should not be based on the settlement amount.

ADI contends that the trial court erroneously refused to accord conclusive effect to the $2.7 million damage amount in the Mendoza, Jr. settlement and erred in ruling that Frize may refuse to honor its indemnification obligation and then

relitigate the reasonableness of a judgment obtained against the indemnitee after a judicial determination of damages.

DISCUSSION

1. *The trial court correctly ruled that ADI was entitled to indemnification from Frize.*

We address Frize's cross-appeal first because it is the logical predecessor to the contentions raised by ADI's appeal. Frize contends that ADI was not entitled to indemnity under paragraph 26. Frize insists that the contract "*must, as a matter of law*, be held to constitute a *general* indemnity agreement" that did not require Frize to indemnify ADI for its active negligence. (Italics added.) We disagree.

a. *Paragraph 26 is a Type I indemnity provision because it specifically and unambiguously indemnifies ADI's own negligence.*

" 'Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person.' (Civ. Code, § 2772.) A collection of rules, developed primarily in insurance and construction cases, governs actions to enforce indemnity agreements. Paramount is the rule that '[w]here . . . the parties have expressly contracted with respect to the duty to indemnify, the extent of that duty must be determined from the contract . . . .' [Citations.]" (*Peter Culley, supra*, 10 Cal.App.4th at p. 1492, citing *Rossmoor Sanitation, Inc. v. Pylon, Inc*. (1975) 13 Cal.3d 622, 628 (*Rossmoor*).) Civil Code section 2778 sets forth rules for interpretation of indemnity contracts, unless contrary intention appears in the document itself. (*United States Elevator Corp. v. Pacific Investment Co*. (1994) 30 Cal.App.4th 122, 125.)

Normally, an indemnity agreement may provide for indemnification against an indemnitee's own negligence, as long as the agreement is clear and explicit, and strictly construed against the indemnitee (*Crawford v. Weather Shield Mfg. Inc.* (2008) 44 Cal.4th 541, 552; *Rooz v. Kimmel* (1997) 55 Cal.App.4th 573, 583),

and provided that the indemnitee is not solely negligent. (Civ. Code, § 2782, subd. (a); *Crawford*, *supra*, at p. 553.)[2]

A contractual provision that allows for indemnity for damages arising out of any type of negligence of the indemnitee is termed a Type I clause. (*C. I. Engineers & Constructors, Inc. v. Johnson & Turner Painting Co*. (1983) 140 Cal.App.3d 1011, 1014 (*C. I. Engineers*).)

An indemnity provision that does not make express reference to the indemnitee's own negligence is termed a "general" or "Type II" indemnity clause. (*Guy F. Atkinson Co. v. Schatz* (1980) 102 Cal.App.3d 351, 356 (*Guy F. Atkinson Co.*); *MacDonald & Kruse, Inc. v. San Jose Steel Co*. (1972) 29 Cal.App.3d 413, 422.) General indemnity contracts may protect indemnitees from the consequences of their *passive*[3] negligence that solely or contributorily cause their

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[2] The Supreme Court issued *Crawford v. Weather Shield Mfg. Inc*., *supra*, 44 Cal.4th 541, after briefing in this case was complete and so we asked the parties to provide supplemental briefing on the effect of that opinion on this case. Having considered *Crawford* and the parties' letter briefs, we conclude that other than the statements of general indemnity law, *Crawford* is not on point. The issue here is whether Frize was required to indemnify ADI under the parties' agreement, the extent of the indemnity obligation, and whether and how any indemnity responsibility was affected by ADI's settlement with Mendoza, Jr. and the referee's award. By contrast, the Supreme Court in *Crawford* was presented with "no issue . . . of the effect of [the indemnitee's] settlement with the [third party] on [the indemnitor's] indemnity liability. We confront the *separate* question whether the express terms of [the indemnitor's] subcontract required [the indemnitor], at its own expense, to assume [the indemnitee's] defense, and, having failed to do so, to reimburse [the indemnitee] after the fact for the latter's actual defense costs, *regardless* of [the indemnitor's] liability to indemnify [the indemnitee] for amounts paid to the [third party] in settlement." (*Id.* at p. 554, fn. 6, italics added.) The issue in *Crawford* was "the contractual duty to *defend* in a noninsurance context" (*id*. at p. 547, original italics omitted, italics added) and so that case is of limited value here.

[3] " 'Passive negligence is found in mere nonfeasance, such as the failure to discover a dangerous condition or to perform a duty imposed by law. [Citations.] Active negligence, on the other hand, is found if an indemnitee has personally participated in an affirmative act of negligence, was connected with negligent acts

liability, but in the past, they would usually not provide indemnity for a party that has been *actively* negligent. (*Rooz v. Kimmel*, *supra*, 55 Cal.App.4th at p. 583, citing *Rossmoor*, *supra*, 13 Cal.3d at p. 628.)

Examples of *general* or Type II indemnity promises that covered only passive negligence were identified in *Guy F. Atkinson Co.*, *supra*, 102 Cal.App.3d 351. " 'Provisions purporting to hold an owner harmless "in any suit at law" [citation], "from all claims for damages to persons" [citation], and "from any cause whatsoever" [citation], *without expressly mentioning an indemnitee's negligence, have been deemed to be "general" clauses*.' [Citation.]" (*Id.* at pp. 356-357, italics added.) Other such examples include promises, "to hold the indemnitee harmless from the indemnitee's liabilities 'howsoever same may be caused' [citation], 'regardless of responsibility for negligence' [citation], 'arising from the use of the premises, facilities or services of [the indemnitee]' [citation], 'which might arise in connection with the agreed work' [citation], ' "caused by or happening in connection with the equipment or the condition, maintenance, possession, operation or use thereof" ' [citation], 'from any and all claims for damages to any person or property by reason of the use of said leased property' [citation] ' "[caused by] any person or persons whomsoever" ' [citation]." (*MacDonald & Kruse, Inc. v. San Jose Steel Co.*, *supra*, 29 Cal.App.3d at pp. 422-423.)

Based on these authorities, the contract here is *not* a general or Type II indemnification agreement. Frize agreed to indemnify ADI "from all loss and damage . . . and all claims . . . arising from anything *done by the negligence of*" ADI. (Italics added.) Paragraph 26 expressly addresses ADI's own negligence

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or omissions by knowledge or acquiescence, or has failed to perform a precise duty which the indemnitee had agreed to perform.' [Citation.]" (*Rooz v. Kimmel*, *supra*, 55 Cal.App.4th at p. 583, fn. 5.) The jury here was instructed on the meaning of passive and active negligence. On appeal, neither party challenges the sufficiency of the evidence to support the jury's finding that ADI was actively negligent.

and thus cannot be a Type II or general provision. (*Guy F. Atkinson Co.*, *supra*, 102 Cal.App.3d at p. 357.) Certainly, this language makes more direct and plain reference to ADI's own negligence than the oblique references cited by *MacDonald & Kruse, Inc. v. San Jose Steel Co.*, *supra*, 29 Cal.App.3d 413, such as " 'regardless of responsibility for negligence.' " (*Id*. at p. 422.)

Frize argues that the contract indemnifies for passive negligence even if the word "negligence" is taken out of the contract, with the result that the insertion of the word "negligence" does not change the meaning once it is returned to the contract. To the contrary, Frize's construction would render the word "negligence" wholly unnecessary in contravention of the rule that all words in a contract are to be given meaning (see Civ. Code, § 1641). These words were added for the deliberate purpose of indemnifying specifically for negligence qua negligence.

Frize's attempts to create uncertainty are unavailing.[4] (Cf. *Armco Steel Corp. v. Roy H. Cox Co.* (1980) 103 Cal.App.3d 929, 935 (*Armco Steel*) [where ambiguity in meaning suggested a finding of general indemnity provision].) The contract here is not ambiguous. It directly and specifically covers "anything done by the negligence of" ADI. Hence, the contract's language is sufficiently plain to support the jury's conclusion that the terms were clear enough for the parties to understand their obligations. Because the contract is not a general indemnity provision, ADI is not precluded from indemnification merely because the jury found it's negligence to be active. (*C. I. Engineers*, *supra*, 140 Cal.App.3d at p. 1014.)

In any event, since the taxonomy of "Type I" and "Type II" agreements was first articulated in *MacDonald & Kruse, Inc. v. San Jose Steel Co.*, *supra*, 29

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[4] Nor is the contract adhesive, Frize's contentions to the contrary notwithstanding. There is no indication of unequal bargaining positions between the parties. There is no evidence that the contract was offered in a take-it or leave-it manner. (*Victoria v. Superior Court* (1985) 40 Cal.3d 734, 743.)

Cal.App.3d 413, courts have moved away from a strict adherence to that mechanical rule for interpretation of indemnity clauses. (*C. I. Engineers*, *supra*, 140 Cal.App.3d at pp. 1014-1015; *Rooz v. Kimmel*, *supra*, 55 Cal.App.4th at p. 582 [involving hold harmless provision in an indemnity contract and noting that general rules of construing indemnity provisions apply to exculpatory clauses]; *Hernandez v. Badger Construction Equipment Co*. (1994) 28 Cal.App.4th 1791; *Morton Thiokol, Inc. v. Metal Building Alteration Co.* (1987) 193 Cal.App.3d 1025, 1028-1029; *Maryland Casualty Co. v. Bailey & Sons, Inc.* (1995) 35 Cal.App.4th 856, 867.) Instead, courts now determine the scope of the duty to indemnify from the language of the contract. (*Rooz v. Kimmel*, *supra*, at p. 583, fn. omitted, citing *Rossmoor*, *supra*, 13 Cal.3d at p. 628.) Courts focus on what the parties intended in the circumstances of their own agreement. (*C. I. Engineers*, *supra*, at pp. 1014-1015; *Rossmoor*, *supra*, at p. 633; see also, *Morton Thiokol, Inc. v. Metal Building Alteration Co.*, *supra*, at pp. 1028-1029; *Rooz v. Kimmel*, *supra*, at pp. 583-584.)

Accordingly, cases that reject the active-passive rubric in favor of discerning the intention of the parties from the contract have found agreements to indemnify for the indemnitee's own active negligence. In *C. I. Engineers*, *supra*, 140 Cal.App.3d 1011, a painting subcontractor's employee was injured at work through the negligence of both the employee and the general contractor. The indemnity agreement provided that the subcontractor would indemnify the general contractor "against any and all liability, claims, judgments, or demands," except for "claims or litigation arising through the sole negligence or sole willful misconduct" of the general contractor. (*Id*. at p. 1014.) The appellate court held that this clause was a Type I provision under which the subcontractor was obligated to indemnify the general contractor, even though the latter was negligent. Whether the general contractor's negligence was deemed active or passive was not dispositive. (*Id.* at p. 1018.)

In *Morton Thiokol,* a subcontractor's employee was injured during construction because of the contractor's and the owner's negligence. The parties' indemnification provision did not mention the owner's negligence, but did require the contractor to use appropriate safety measures. The owner, found to have been actively negligent, sought indemnification from the contractor. (*Morton Thiokol, Inc. v. Metal Building Alteration Co., supra,* 193 Cal.App.3d at pp. 1027-1029.) *Morton Thiokol* held, "denying indemnity here would deprive the indemnitee of the benefit of its bargain and read out of the contract essential provisions intended by the parties to govern their relationship, in violation of the principle that contracts should be read in a manner which renders them reasonable and capable of being put into effect. [Citations.] In so concluding we are faithful to our high court's admonition in *Rossmoor Sanitation, Inc. v. Pylon, Inc., supra,* 13 Cal.3d 622 that the active-passive rubric ought not to be wholly dispositive, but that instead the enforceability of an indemnity agreement shall primarily turn upon a reasonable interpretation of the intent of the parties. (*Id.* at p. 633.) Where, as here, the agreement clearly indicates that one party was to be indemnified for any damages sustained as a result of another's breach of the contract, and it is undisputed that the accident would never have happened except for such breach, we conclude that the indemnity is viable notwithstanding the jury's finding of the indemnitee's 'active' negligence." (*Morton Thiokol*, *supra*, at p. 1030, fns. omitted.)

In *Hernandez v. Badger Construction Equipment Co*., *supra,* 28 Cal.App.4th 1791, the owner rented a crane from an equipment lessor. An employee of the owner was injured at work using the crane. (*Id*. at p. 1800.) The *Hernandez* court agreed with the lessor that the owner was required to indemnify it for the lessor's liability to the worker, notwithstanding the lessor was *actively* negligent. (*Id*. at pp. 1819-1820.) Noting the evolution in the law since *MacDonald & Kruse*'s classifications of contractual indemnity provisions (*Hernandez*, *supra*, at pp. 1820, 1823), *Hernandez* applied contractual

interpretation principles and considered the intent of the parties as expressed in the agreement. *Hernandez* concluded that, "reasonably construed, the contractual language obligated [the owner] to indemnify [the lessor] for the portion of [the lessor's] liability attributable to [the owner's] fault. Such interpretation is consistent with [the lessor's] reasonable expectation it would be indemnified for liability arising from the negligence of [the owner]. Thus, we conclude despite its 20 percent *active* negligence [the lessor] was contractually entitled to indemnification from [the owner] for the portion of plaintiffs' joint and several economic damage award attributable to [the owner's] 55 percent negligence that is ultimately paid by [the lessor]." (*Id.* at p. 1822, italics added.) Together, these cases show an evolution away from formulaic rules toward contract interpretation that makes no dispositive distinction between active and passive negligence.

We therefore disagree with Frize that an indemnity provision can only be read to indemnify for active negligence if it contains the words "active" or "passive." Frize cites *Armco Steel, supra,* 103 Cal.App.3d 929. There, although the promise referred to the indemnitee's negligence, *Armco Steel* ruled it was a general indemnity clause that did not indemnify for active negligence where the language did not do so "expressly and unequivocally so that the indemnitor is advised in definite terms of the liability to which it is exposed." (*Id*. at pp. 934-935.) The *Armco Steel* clause covered " 'any and all claims which may be made against Buyer by reason of [personal injury or property damage] however caused or alleged to have been caused *and even though claimed to be due to the negligence of Buyer . . . .*" (*Id*. at p. 931, italics added.) Quite apart from whether we agree with *Armco Steel*'s conclusion, we hold that the language in paragraph 26 indemnifies for ADI's own negligence, clearly identifying for Frize the terms of liability to which it was exposed. Ultimately, we think *Armco's* slavish obedience to the active-passive rubric is outdated in light of "evolving and presumably more equitable trend in statutory and case law toward allocating liability in proportion to comparative fault[citations]" (*Hernandez v. Badger*

Construction Equipment Co. supra, 28 Cal.App.4th at p. 1823), and the Supreme Court's caution against strict application of the "active-passive dichotomy" as not "wholly dispositive" of the issue. (*Rossmoor, supra*, 13 Cal.3d at p. 632.) Rather, we agree with the synthesis of the law expressed in *C. I. Engineers*, *Morton Thiokol*, and *Hernandez*.

b. *Paragraph 26 indemnifies for ADI's active negligence.*

Turning to the language of paragraph 26, the parties here intended that Frize indemnify ADI for the latter's own negligence in connection with work done. Not only does the contract make specific reference to ADI's own negligence, but that language is expansive in that it covers "any and all liabilities," and "all loss and damage," "arising from anything done by the negligence of" ADI "while engaged in the performance of any act directly or indirectly related to work done . . . ." The words "any and all" and "anything done by" denote an unrestricted range of malfeasance. Furthermore, paragraph 26 covers claims "arising from the failure of" a party "to conform to the statutes . . . regulations or requirements of any governmental authority." The violation of a statute raises the possibility of negligence per se (Evid. Code, § 669) and the specter of *active* negligence (see fn. 3, *supra*), such as ADI's violation of the OSHA requirements for lock out and tag out procedures.[5] In our view, the language of paragraph 26 directly indemnifies for ADI's own negligence, and encompasses a broad spectrum of malfeasance, including active negligence, clearly identifying for Frize its obligations.

Furthermore, the history of the parties' relationship here, as brought out by the undisputed extrinsic evidence admitted by the trial court, also compels the

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[5] " '[U]nder the negligence per se doctrine . . . codified in Evidence Code section 669, "violation of a statute gives rise to a presumption of negligence in the absence of justification or excuse, provided that the 'person suffering . . . the injury . . . was one of the class of persons for whose protection the statute . . . was adopted.' " [Citation.]' " (*Ramirez v. Nelson* (2008) 44 Cal.4th 908, 918.)

conclusion that ADI is entitled to indemnity for its active negligence. As the trial court observed, although ADI is bigger than Frize and drafted the contract, Frize is "not the neighborhood painter," but does "millions of dollars of" painting work. The parties have had over $4 million in contracts with each other and have been doing business together for some time. Although Mr. Frize testified that he did not read paragraph 26, he acknowledged that since this lawsuit over the indemnity language, he has signed more of the same purchase orders *with ADI* without seeking to change that paragraph.[6] And, the jury *found* that the parties had read the contract and understood it, a finding not challenged as lacking substantial evidence. Finally, it was Frize who chose to subcontract with J. C. French without assuring that J. C. French hired employees who were sufficiently mature and experienced. To deny ADI the benefit of its bargain here would effectively read out an essential provision of the contract "in violation of the principle that contracts should be read in a manner which renders them reasonable and capable of being put into effect. [Citation.]" (*Rooz v. Kimmel*, *supra*, 55 Cal.App.4th at p. 586.) This we will not do. The trial court did not err in ruling that paragraph 26 was a Type I indemnity provision that indemnified ADI for its own negligence, even though it was actively negligent.

2. *The trial court did not err in submitting to the jury the question of the reasonableness of the Mendoza, Jr. damages award and whether the judgment was collusive.*

Turning to ADI's contentions on appeal, it argues that the trial court erred in refusing to accord conclusive effect to the underlying Mendoza, Jr. judgment pursuant to Civil Code section 2778, subdivision 5. It asserts, where Frize refused

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[6] Frize's references to testimony about the parties' thought processes when entering into the contract to argue that Mr. Frize did not objectively agree to the indemnity agreement are irrelevant: statements of "unexpressed intent cannot be used to interpret a contract." (*Oakland-Alameda County Coliseum, Inc. v. Oakland Raiders, Ltd*. (1988) 197 Cal.App.3d 1049, 1058.)

to accept ADI's numerous tenders of defense and the jury found later that the referee's judgment was not collusive, that the $2.7 million judgment was conclusive as to Frize. (Civ. Code, § 2778, subd. 5.)

a. *Civil Code section 2778, subdivision 5 and the conclusive effect of a settlement on the indemnitee's liability and extent thereof*

Civil Code section 2778, subdivision 5, concerning the interpretation of indemnity contracts, reads: "If, after request, the person indemnifying neglects to defend the person indemnified, a *recovery against the latter suffered by him* in good faith, is conclusive in his favor against the former[.]" (Italics added.)

ADI contends, where Frize declined numerous tenders of defense, that the referee's determination, signed by the trial court, is a "recovery" and that a covenant not to execute on the underlying judgment does not preclude the application of Civil Code section 2778, subdivision 5. We disagree.

Peter Culley provides guidance about the meaning of Civil Code section 2778, subdivision 5 in the context of a settlement of a negligence lawsuit involving a construction contract with a general indemnity clause. In the underlying action between the architect-indemnitee and the developer, the indemnitor-engineer declined the tendered defense and was not a party. The indemnitee and developer settled and agreed that $200,000 of the indemnitee's payment was for the indemnitor's liability. (*Peter Culley, supra*, 10 Cal.App.4th at p. 1489.) The trial court found that the settlement and the liability allocation were made in good faith under Code of Civil Procedure section 877.6. (*Peter Culley, supra,* at p. 1489.) In the ensuing action against indemnitor-engineer to enforce the indemnity rights, as here, the developer contended that the settlement was conclusive as against the indemnitor because it was entered into in "good faith," and where the indemnitor had failed to accept the defense tender, it lost all right to litigate the issue of its negligence. (*Id*. at pp. 1494-1495.)

The appellate court disagreed. *Peter Culley* explained, " 'Recovery' " in Civil Code section 2778, subdivision 5 is not defined by the statute, but neither

does the statute mention the possibility of settlement and how it would affect enforcement of an indemnity agreement." (*Peter Culley, supra*, 10 Cal.App.4th at p. 1495.) The court "conclude[d] that insofar as Civil Code section 2778, subdivision 5 makes a 'recovery' suffered in good faith conclusive, the statute refers *only to a recovery by judgment against the indemnitee*. We also conclude that indemnification for either a recovery by judgment or a settlement presupposes that other contractual conditions for indemnity, such as the indemnitor's negligence, have been proven." (*Peter Culley, supra,* at pp. 1495-1496, italics added, fn. omitted.) The court noted that cases mentioning subdivision 5, have "consistently equated 'recovery' with 'judgment' after trial. [Citations.]" Indeed, cases applying section 2778, subdivision 5 to judgments after trial have noted "even a judgment is conclusive only 'in respect to the matters adjudged." (*Peter Culley, supra,* at p. 1496.)

Not only is an unadjudicated settlement not a "recovery" under Civil Code section 2778, subdivision 5, but "an indemnitee does not 'suffer' a 'recovery' " under subdivision 5 "where it stipulates to liability in exchange for a covenant not to execute." (*Aero-Crete, Inc. v. Superior Court* (1993) 21 Cal.App.4th 203, 211.) " 'The covenant not to execute shields the insured from such liability[]' " (*ibid.*, quoting *Smith v. State Farm Mut. Auto. Ins. Co*. (1992) 5 Cal.App.4th 1104, 1114 & *Xebec Development Partners, Ltd. v. National Union Fire Ins. Co.* (1993) 12 Cal.App.4th 501, 537-538), and invites collusion between insureds and claimants. (*Smith, supra,* at p. 1114.) A stipulated judgment with a covenant not to execute does not constitute a "recovery" for purposes of subdivision 5 because the judgment was not the result of an adversary trial and the indemnitee suffers no liability. (*Peter Culley, supra*, 10 Cal.App.4th at p. 1498.)[7]

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[7] ADI argues that *Smith v. State Farm Mut. Auto Ins. Co., supra*, 5 Cal.App.4th at pages 1114 to 1115, implies that a settlement accompanied by a stipulated judgment may be considered a "recovery" under Civil Code section 2778, subdivision 5 even when there is a covenant not to execute. However, *Smith*

Nonetheless, a settlement with a covenant not to execute does not automatically preclude the settling indemnitee from recovering from an indemnitor who wrongfully refuses indemnification or defense. Although a settlement without trial under subdivision 5 of Civil Code section 2778, would not be *conclusive* as against the indemnitor, the principles of settlements in the insurance context would apply. (*Peter Culley, supra,* 10 Cal.App.4th at p. 1497.)

b. *Insurance law principles and the presumption of the insured's liability and extent thereof*

In the insurance-law realm, " 'The law is well settled that, where one is bound either by law or agreement to protect another from liability, he [she] is bound by the result of a litigation to which such other is a party, provided he [she] had notice of the suit and an opportunity to control and manage it. [Citations.] . . . The judgment recovered in such a case is the mode by which the insured proves to the insurer that the intrinsic character of the accident was such that he [she] was liable for the consequences of it, and the judgment is conclusive evidence that the insured was liable, and to the extent of the amount of the judgment. [Citations.]' " (*Peter Culley, supra,* 10 Cal.App.4th at p. 1493.)

In contrast is the situation " 'where there is no trial and no judgment establishing the liability of the insured, but a settlement of the litigation has been made, the question whether the liability of the insured was one which the contract of insurance covered is still open, as is also the question as to the fact of liability and the extent thereof, and these questions may be litigated and determined in the action brought by the insured to recover the amount so paid in settlement.' [Citation.] '[I]f an insurer wrongfully fails to provide coverage or a defense, and the insured then settles the claim, the insured is given the benefit of an evidentiary presumption. In a later action against the insurer for reimbursement based on a

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held that a criminal conviction of manslaughter was sufficient to meet the requirement of a "judgment." Here, ADI never tried the question of liability and never put on a defense to that question. Hence, reliance on *Smith* is unavailing.

breach of its contractual duty to defend the action, a reasonable settlement made by the insured to terminate the underlying claim against him [her] may be used as *presumptive evidence* of the insured's liability on the underlying claim, and the amount of such liability. [Citations.]' " (*Peter Culley*, *supra*, 10 Cal.App.4th at pp. 1493-1494, italics added, citing *Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 791.)

This evidentiary presumption is not conclusive, however. Such a settlement is presumptive evidence only of the insured's liability and amount thereof (see *Mel Clayton Ford v. Ford Motor Co*. (2002) 104 Cal.App.4th 46, 56), and may be overcome by proof on the part of the insurer that the settlement was not reasonable or not free of fraud or collusion. (See, *Pruyn v. Agricultural Ins. Co*. (1995) 36 Cal.App.4th 500, 522.)

Applying these insurance principles to indemnity contracts, *Peter Culley* explained, "[t]he burden of proof on an indemnitee . . . seeking to establish the liability of an indemnitor . . . under an express contract of indemnity where the indemnitee has settled the underlying claim is generally set forth as follows: '[W]hen the indemnitee settles without trial, . . . the indemnitee must show the liability is covered by the contract, that liability existed, and the extent thereof.' [Citations.]" (*Mel Clayton Ford v. Ford Motor Co*., *supra*, 104 Cal.App.4th at p. 54.) Once the indemnitee makes this showing, the settlement becomes *presumptive evidence* of liability of the indemnitee and of the amount of that liability. The burden then shifts to the indemnitor to prove that the settlement was unreasonable, either "unreasonable in amount, entered collusively or in bad faith, *or* entered by an indemnitee not reasonable in the belief that he or she had an interest to protect[]." (*Peter Culley, supra,* 10 Cal.App.4th at p. 1497, citing *Lamb v. Belt Casualty Co.* (1935) 3 Cal.App.2d 624, italics added, & *Isaacson v.*

California Ins. Guarantee Assn., supra, 44 Cal.3d 775; see also, *Pruyn v. Agricultural Ins. Co., supra*, 36 Cal.App.4th at p. 522.)[8]

c. *The trial court properly applied the Peter Culley model.*

ADI entered into a settlement under which it waived the issue of liability but tried the question of damages, and obtained a covenant not to execute. The amount of the referee's damages judgment cannot be conclusive as against Frize because no "recovery" was "suffered" by ADI under Civil Code section 2778, subdivision 5. Under principles of settlements in the insurance law context, ADI bore the burden in the indemnity action to prove that liability was covered by the contract, that liability existed, and the extent thereof. (*Peter Culley*, *supra*, 10 Cal.App.4th at p. 1497.) The settlement became "*presumptive evidence of liability* of [ADI] and of the amount of liability." The trial court properly shifted the burden to Frize to attempt to rebut that presumption by proving that the settlement was unreasonable in amount, or collusive, or that ADI did not reasonably believe it had an interest to protect. (*Ibid.*, italics added.) The trial court correctly submitted to the jury the question of the extent of the indemnity provision (*ibid.*), the reasonableness of the damages judgment, and whether the judgment was collusive.[9]

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[8] ADI also argues, citing *Pruyn v. Agricultural Ins. Co., supra*, 36 Cal.App.4th 500, among other cases, that the covenant not to execute does not prevent a finding under Civil Code section 2778, subdivision 5 that the settlement is conclusive, notwithstanding the holding of *Peter Culley*. However, the result here is the same as we contemplated in *Pruyn* in the insurance context. Given the Mendoza, Jr. damages were the result of a settlement coupled with a covenant not to execute, "[t]he critical question" remained, "was the settlement reasonable and free of fraud and collusion?" (*Pruyn, supra*, at p. 522.) And, the burden was properly placed on Frize to demonstrate to the jury that the Mendoza, Jr. damages were not reasonable. Therefore, as in the insurance cases, the stipulated judgment was not conclusive under Civil Code section 2778, subdivision 5, but it does have value as it constitutes rebuttable presumptive evidence of ADI's exposure.

[9] ADI argues, even if the trial court correctly allowed Frize to challenge the reasonableness of the Mendoza, Jr. damage award after balking at its contractual

ADI contends that we should not follow *Peter Culley*. Toward that end, ADI first argues that "recovery" must mean something broader than a judgment as defined by *Peter Culley*. As evidence of this, ADI contrasts subdivision 6 of Civil Code section 2778, which refers to a "judgment," with subdivision 5, which uses the word "recovery." Subdivision 6 reads, "If the person indemnifying . . . has not reasonable notice of the action or proceeding against the person indemnified, or is not allowed to control its defense, *judgment* against the latter is only presumptive evidence against the former[.]" (Italics added.) ADI insists that the Legislature's use of "recovery" in subdivision 5 and "judgment" in subdivision 6 must have some significance, otherwise the indemnitee would be stripped of the statute's protections if a judgment is necessary under either subdivision. *Peter Culley* dismissed this argument in a footnote, stating "Directed to protecting an indemnitor's interest in participating in the defense, subdivision 6 is not at issue *where, as here, an indemnitor has refused the defense*." (*Peter Culley, supra,* 10 Cal.App.4th at p. 1496, fn. 2, italics added.) Just as in *Peter Culley*, subdivision 6 of Civil Code section 2778 is irrelevant here because Frize refused numerous defense tenders. More to the point, however, regardless of which word is utilized, subdivision 5 would not apply in this case to make the Mendoza, Jr. damages conclusive because as the result of the covenant not to execute, ADI had limited any liability it would "suffer." (See *Aero-Crete, Inc. v. Superior Court, supra,* 21 Cal.App.4th at p. 211.)

Next, ADI argues that if, following *Peter Culley*, settlements such as the one here were not conclusive and a jury later concluded that the settlement amount was unreasonable, then an indemnitor could avoid responsibility for wrongful

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defense and indemnity obligations, then the court erred in not allowing the jury to have all of the evidence that the referee did. We think the court properly excluded exhibit 9 as far more prejudicial than probative. (Evid. Code, § 352.) Moreover, ADI's decision to allow this inflammatory evidence to be viewed by the referee only underscores the jury's conclusion that ADI did not reasonably believe it had an interest to protect as the result of the settlement.

conduct and injured plaintiffs such as Mendoza, Jr., would have little incentive to settle with the indemnitee in exchange for an assignment of rights. While we agree that "an indemnitor should not be permitted to relitigate a fair number fairly arrived at" (*Aero-Crete, Inc. v. Superior Court, supra,* 21 Cal.App.4th at p. 211), so too the indemnitee should not be allowed indemnification when it "suffers" no "recovery." As we explained in *Pruyn*, the indemnitee, faced with a balking indemnitor, has the freedom to negotiate the best possible settlement consistent with his or her interests, including a stipulated judgment accompanied by a covenant not to execute. (*Pruyn v. Agricultural Ins. Co., supra*, 36 Cal.App.4th at p. 509.) Contrary to ADI's suggestion, the settling indemnitee and personal injury plaintiff are not *barred* from benefitting by such a settlement under our analysis here and that in *Pruyn*. Rather, a balanced approach is used whereby a jury considers whether the contractual conditions precedent to indemnification are proven. Such conditions precedent are that: liability is covered by the contract, the indemnitee is liable, the extent of liability, whether the stipulated judgment was unreasonable in amount, whether it was entered into collusively or in bad faith, or whether entered into by an indemnitee that had no reasonable belief that he or she had an interest to protect. (*Peter Culley, supra*, 10 Cal.App.4th at p. 1497; see also, *Pruyn, supra*, at p. 522.) If these issues are resolved in the indemnitee's favor, "then we see no reason why . . . the policy on which Civil Code section 2778, subdivision 5, is grounded would not be satisfied. [Citation.]" (*Pruyn, supra*, at pp. 522-523.)

ADI next attempts to distinguish *Peter Culley* on its facts by arguing that the Mendoza, Jr. judgment was the result of a trial and independent determination of *damages*.[10] However, notwithstanding that the damages issue was tried here,

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[10] *Valentine v. Membrila Ins. Services, Inc.* (2004) 118 Cal.App.4th 462, is inapposite because it involved an attempt to use a settlement offensively against an insurance broker for negligence in procuring or explaining a policy and not against an insurer for violating the duties to defend or indemnify. (*Id*. at p. 473.)

ADI *settled without contesting liability* and so an important contractual condition for indemnity was never adjudicated. (*Peter Culley, supra*, 10 Cal.App.4th at pp. 1495-1496, fn. omitted.) What is more important, however, the evidence supports the jury's finding that ADI participated in the damages trial to the referee when it *had no reasonable belief it had an interest to protect*. We are unpersuaded by ADI's lengthy argument about its belief in the extent of its liability exposure. At oral argument, ADI's counsel referred to the damages trial to the referee as a "prove up." ADI never adjudicated liability and it never mounted a defense or even attempted to put on evidence of Mendoza, Jr.'s comparative fault. (*Id.* at pp. 1496-1497.) The referee was not asked to make any fault allocation. Thereafter, ADI limited its exposure by fashioning a settlement under which ADI paid $350,000 to Mendoza, Jr. *only* if the damages found by the referee did not exceed that sum. Having secured for itself a cap on its own damages risk and receiving Mendoza, Jr.'s covenant not to execute, ADI cannot seriously argue it felt any real need to defend itself before the referee. Therefore, it did not "suffer" a "recovery" under Civil Code section 2778, subdivision 5 and the damages amount became presumptive evidence only. In sum, the trial court correctly submitted to the jury the questions of the extent of the indemnity promise, the reasonableness of the Mendoza, Jr. judgment, and whether that judgment was collusive.

3. *The trial court did not err in awarding ADI only the damages it actually suffered*.

Finally, ADI contends, even if we conclude that the reasoning of *Peter Culley* applies and the Mendoza, Jr. judgment is not conclusive pursuant to Civil Code section 2778, subdivision 5, that the trial court erred as a matter of law in fixing Frize's liability at the amount ADI actually paid in the personal injury action. Observing that *Peter Culley* went no further than to hold that the evidentiary presumption raised by the underlying settlement may be overcome by the indemnitee's proof that it was unreasonable, ADI argues there is no case law

indicating what the next logical step should be. ADI observes that the court never asked the jury to re-determine the damages and had it done so, it might have concluded, while $2.7 million was unreasonable, $2.5 million would not have been. ADI is wrong.

Subdivision 2 of section 2778 of the Civil Code reads, "Upon an indemnity against claims, or demands, or damages, or costs, expressly, or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof[.]" And, ADI is entitled to the attorney fees and costs. As explained by *Aero-Crete, Inc. v. Superior Court, supra,* 21 Cal.App.4th at page 212: "While 'mere' contractual indemnitors do not assume the tort damages risk [of insurers], they would be liable for the indemnitee's attorney fees if it were shown that they breached their contractual obligations. [Citation.]"

Here, once the trial court properly ruled that paragraph 26 entitled ADI to a defense and indemnification for its active negligence, and once the jury heard the evidence and found that the amount of Mendoza, Jr.'s damages was unreasonable, the trial court properly entered judgment in favor of ADI for the amount it paid out in claims, damages, fees, and costs. (Civ. Code, § 2778, subd. 2.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.